IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1278

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner,

vs.

FRED DOYLE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. JURISDICTION CAN NOT BE MAINTAINED UNDER 28 U.S.C. SECTION 1331 BECAUSE FRED DOYLE DID NOT HAVE A CLAIM WORTH $10,000 WHEN HE FILED SUIT.

The test to determine the amount in controversy under general federal question jurisdiction is the value to the

plaintiff of the relief he seeks. *Packard* v. *Banton,* 264 U.S. 140, 142 (1924). On July 13, 1971 when Fred Doyle filed suit in Federal District Court, his claim was worth, at most, only the difference between his salary at Mt. Healthy for the 1971-72 school year and what he would earn at Miami Trace — roughly $2,000. The rule established in *Columbian Ins. Co.* v. *Wheelright,* 20 U.S. 534 (1822), that the amount in controversy is the salary of the position in issue, does not apply when other employment has already been obtained, *Kochar* v. *Auburn University,* 304 F.Supp. 565 (M.D. Ala. E.D. 1969); see also *Zartman* v. *Board of Educ.,* 330 Ohio Misc. 217 (1972). Nor can potential loss in earnings be aggregated indefinitely into the future. *Ross* v. *Prentiss,* 44 U.S. (3 How.) 771 (1845). *Cf. Eisen* v. *Eastman,* 421 F.2d 560, 566 (2d Cir. 1969); *Dougall* v. *Sugarman,* 330 F.Supp. 265 (S.D. N.Y. 1971). Furthermore the court cannot determine the value of a continuing contract at Mt. Healthy as opposed to a one year contract at Miami Trace without engaging in the kind of wild speculation that Counsel for Doyle finds so objectional when considering alternative employment. (Respondent's Brief pp. 20, 21)

The fact is that when Doyle filed suit he was under contract with Miami Trace. The value of that contract would be (and was) offset against his potential earnings at Mt. Healthy, leaving him a claim, when the action was instituted, of only approximately $2,000 in loss of salary. For the reasons stated in Petitioner's Brief at pages 21-23 — and not disputed by Respondent — the other relief sought in the original complaint does not increase the value of the claim.

Nor, under the reasoning of *Bishop* v. *Wood,* — U.S. —, 48 L.Ed.2d 684 (1976), can Doyle claim a property interest in his job since he had not yet obtained

tenure. Under Ohio law[1] tenure is created by statute. Until the statutory requirements are met, a teacher has no right to reappointment or continuing employment from year to year. Therefore no monetary value can be

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[1] Section 3319.11 of the Ohio Revised Code reads:

"3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act

Teachers eligible for continuing service in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be reemployed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent re-employment only a continuing contract may be entered into. If the board of education does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed re-employed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant

given to Doyle's eligibility for tenure. In short, Respondent cannot meet the jurisdictional requirements of 28 U.S.C. § 1331.

II. THE BOARD OF EDUCATION DID NOT RELY ON THE PHONE CALL TO WSAI IN REACHING ITS DECISION NOT TO REAPPOINT FRED DOYLE.

There is no evidence in the record that the Board relied on the WSAI call. As noted by Judge Hogan in the District Court:

> "The superintendent and each of the four board members, who testified in this case, testified that his or her vote or recommendation was not based in any way on any activity of the plaintiff in the free speech or assemblage field." (A. p. 26)

The judge further stated that there were permissible reasons for the non-renewal:

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to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed re-employed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration

> "In fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason — (see *James* v. *West Virginia,* 322 F.Supp. 217 (S.D. W. Va. 1971), *aff'd* 448 F.2d 785 (4th Cir. 1971)) — independent of any First Amendment rights or exercise thereof, to not extend tenure." (A. pp. 27, 28).

These findings are supported by the record. In the examination of Vivian Clark the following exchange took place:

> "Q. At any time did Mr. Ralph or anyone else say that the mere calling of WSAI justified the nonrenewal of Mr. Doyle's contract?
> A. No, of course not." (A. p. 237, T. 447)

When a similar question was put to William Charles Lippmeier his response was an emphatic: "No, he did not." (A. 230, T. 435) And the testimony as a whole indicates that the Board's decision was premised on a unanimous concern about Doyle's lack of maturity as demonstrated in all the

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of such limited contract, deemed re-employed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic re-employment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed re-employed under either a limited or continuing contract as the case may be under the provisions of this section."

other incidents. (A. 191, 196, 209, 213, 225, 239, 268) (T. 350, 356, 397, 403, 427, 449, 523) Counsel for Doyle distorts the record when he speaks of the Board's reliance on the WSAI incident (Respondent's Brief pp. 12, 25, 34, 40). The record shows that the same decision would have been reached without the call.

III. THE MT. HEALTHY BOARD OF EDUCATION IS A MERE PUBLIC AGENCY OF THE STATE ESTABLISHED FOR THE SOLE PURPOSE OF ADMINISTERING THE STATE SYSTEM OF PUBLIC EDUCATION AND AS SUCH IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

Ohio law consistently holds that school districts are mere public agencies of the state clothed with the same immunity as the state. *Finch* v. *Board of Educ.*, 30 Ohio St. 37 (1876); *Board of Educ.* v. *Volk*, 72 Ohio St. 469, 74 N.E. 646 (1905); *Board of Educ.* v. *McHenry, Jr.*, 106 Ohio St. 357, 140 N.E. 169 (1922); *Elias* v. *Newton*, 53 Ohio App. 38, 4 N.E.2d 146 (1936); *Shaw* v. *Board of Educ.*, 17 Ohio Law Abs. 588 (App. 1934); *Hall* v. *Columbus Board of Educ.*, 32 Ohio App. 2d 297 (1972). See also *Dunn* v. *Brown County Agricultural Society*, 46 Ohio State 93, 96, 18 N.E. 496 (1888).

School districts are not liable in an action for damages unless made so by a legislative enactment which clearly, in terms which are neither doubtful nor ambiguous, imports a legislative intention to abrogate or modify the rule of immunity. Thus in *Conrad* v. *Board of Educ.*, 29 Ohio App. 317, 163 N.E. 567 (1928), the Court refused to hold the district liable for a shop accident even though a safety statute had been violated.

Similarly statutes simply granting authority to a board of education to sue or be sued and granting broad powers to contract and to acquire, use, and dispose of property for school purposes,[2] do not affect the board's tort immunity. *Board of Education* v. *Volk*, 72 Ohio St. 469, 74 N.E. 646 (1905). See Petitioner's Brief pp. 31, 32.

Likewise, a permissive statute[3] providing that a board may issue bonds to pay a judgment against it cannot, standing alone, create a liability where none otherwise exists. *Shaw* v. *Board of Educ.*, 17 Ohio Law Abs. (mco Oct. 3, 1934).

In fact, Section 133.27, Ohio Revised Code, is a very narrow grant of power. Respondent argues that the Board is authorized by statute to sell bonds to pay a judgment under Section 133.27, Revised Code. (Respondent's Brief p. 54). Respondent, however, neglects to point out that Article XII, Section 11, of the Ohio Constitution[4] provides that bonded indebtedness of the state or a political subdivision – including the school district – cannot be incurred unless the authorizing unit provides for a levy to pay the interest and to provide a sinking fund for the final redemption of the bonds at maturity. Article XII, Section 2, of the Constitution[5] limits unvoted property

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[2] Section 3313.17, Ohio Revised Code, Petitioner's Brief p. 60.

[3] Section 133.27, Ohio Revised Code, Respondent's Brief p. 54, n. 29.

[4] Article XII, Section 11 of the Ohio Constitution reads:

"No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

[5] Article XII, Section 2 of the Ohio Constitution reads:

"No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state

taxes to one percent of the true value of the property; additional taxes outside that limit may be levied only if approved by the voters. Article XII, Section 2, along with Section 5705.02 Revised Code[6] which establishes this 10 mill limit on property taxes, operates as an indirect limit on the taxing authority's power to issue bonds. In short, the school district can not sell unvoted general obligation bonds to pay the judgment unless it can cover the debt service within the ten-mill limit on taxes. Since the school district's share of ten-mills is already committed, the Board can not issue unvoted bonds to pay the judgment.

This construction is supported by a 1934 opinion of the

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and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of residents sixty-five years of age and older, and providing for income and other qualifications to obtain such reduction. All bonds outstanding on the 1st day of January, 1913, of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds were outstanding on the 1st day of January, 1913, and all bonds issued for the world war compensation fund, shall be exempt from taxation, and without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law."

[6] Petitioner's Brief p. 10a.

Attorney General (1934 OAG No. 3266, p. 1416, 1421) which reads:

> "Without a doubt, a board of education could by mandamus be required to provide by a levy for current expenses for the payment of judgments . . . . But the issuance of such a writ is undoubtedly subject to some limitations at least. In the first place *the levy which the taxing authority of a subdivision may make for current expenses is limited by the ten mill limitation* and by the action of the budget commission in making adjustments of tax levies as required by Section 5625-4, General Code, [now 5705.04 O.R.C.] and made necessary by reason of statutory limitations and the requirements of mandatory levies provided for by Section 5625-23, General Code [now 5705.31 O.R.C.]. (emphasis added)

Respondent also argues that the taxing authority of the district is broad enough to cover funds to pay a judgment. (Respondent's Brief p. 55) However, Sections 5705.03, 5705.192, and 5705.194, cited by Respondent, all require that the tax be voted. If the voters refuse to pass the levy, the board cannot raise money through those tax provisions. In sum, the local district does not have free wheeling authority to raise funds to pay a judgment for a tort liability in Ohio because in Ohio local districts have only narrowly defined statutory powers. Under the pocketbook test of *Edelman* v. *Jordon,* 415 U.S. 651 (1974), discussed in Petitioner's Brief p. 30, the Mt. Healthy School District is protected by the sovereign immunity of the state.

This reading of eleventh amendment immunity is supported by *Jagnandan* v. *Giles,* 538 F.2d 1166 (5th Cir. 1976), which barred reimbursement of excess tuition paid to a state university on eleventh amendment grounds. In the present case, as in *Jagnandan,* there is no federal legis-

lation authorizing federal courts to award money damages. Consequently *Fitzpatrick* v. *Bitzer,* — U.S. —, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), which permitted retroactive payments from a state retirement fund is not controlling.

In *Fitzpatrick,* Congress had passed Title VII of the Civil Rights Act thereby exercising its authority to enforce section 5 of the fourteenth amendment. *Fitzpatrick* held that the balance between the eleventh and fourteenth amendments must be struck in favor of the fourteenth when Congress has passed specific legislation pursuant to section 5 to enforce the rights guaranteed by the fourteenth amendment. Absent such specific legislation however *Edelman, supra,* is controlling. See *Jagnandan, supra. Edelman* barred recovery in cases such as the present one when relief would have to come from the state on grounds that the eleventh amendment controls.

Respectfully submitted,

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